Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

COMMENTS OF VERIZON

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INTRODUCTION AND SUMMARY

Although state and local governments may impose cable customer service requirements that differ from the default standards adopted by the Commission, such authorities do not have unfettered discretion to regulate video and broadband providers. Instead, in order to avoid federal preemption, any such **rules** must be reasonable and consistent with the limited regulatory jurisdiction assigned to local franchising authorities ("LFAs"). In particular, such rules may not impose requirements on new entrants that would rise to the level of an unreasonable refusal to award an additional franchise, may only be related to cable services, and must be of a type that may fairly be considered "customer service'' **rules,** rather than other types of regulation in disguise. Also, importantly, state or local authorities may not adopt local regulations that conflict with or undermine federal policies encouraging broadband deployment and video competition. The Commission can and should make clear that these limitations restrain local

[1] The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

regulatory jurisdiction, and that any regulations that exceed such limitations are contrary to federal law and invalid.

Also, most of the Commission's rules and conclusions adopted in the ***Franchise Order***[2] to remove barriers to competitive entry posed by the local franchising process should apply to existing franchise holders upon renewal of their current franchises. Of course, to the extent cable operators agreed to do more in their agreements than the Cable Act requires, then they obviously are bound to those terms until their agreements come up for renewal unless the cable operator can satisfy the Act's standards that govern the modification of a franchise.

ARGUMENT

I. Local Customer Service Regulation of Cable Services Is Permitted, But May Not Unreasonably Burden Video Competition and Broadband Deployment.

Although Section 632(d)(2) of the Cable Act provides state or local authorities with some leeway in crafting reasonable cable customer service requirements, it does not allow local and state governments unfettered discretion to regulate video and broadband providers. Instead, the Cable Act constrains state and local authorities by prohibiting them from imposing requirements that are ***so*** onerous that they would rise to the level of an unreasonable refusal to award a competitive franchise or from venturing beyond reasonable "customer service" rules limited to cable service. Moreover, state and local authorities are not permitted to adopt regulations that would undermine the overriding federal policies aimed at encouraging broadband deployment and video competition.

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[2] Report and Order and Further Notice of Proposed Rulemaking, ***Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,*** MB Docket No. 05-311, ¶¶ 139-40 (rel. March 5,2007) ***("Frunchise Order").***

Although many, disparate local customer service regulations make little sense in the context of providers that offer video services over regional or national networks, and such requirements may create significant inefficiencies for such providers, the Cable Act does reserve for local and state governments some authority to adopt certain cable customer service requirements. In relevant part, Section 632(d)(2) of the Cable Act provides that:

> Nothing in this section shall be construed to preclude a franchising authority and a cable operator from *agreeing* to customer service requirements that exceed the standards established by the Commission .... Nothing in this subchapter shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that ***exceed the*** *standards* set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

47 U.S.C. § 552(d)(2) (emphasis added). Therefore, local and state governments have some flexibility to craft customer service requirements that apply to cable operators – particularly with respect to any requirements to which the provider agrees.

Section 632 does not provide unfettered authority, however. The Commission should recognize that local officials are not allowed unrestrained discretion to impose onerous regulation on video and broadband providers under the guise of their cable customer service authority. Instead, their authority is subject to several limitations.

1. First, the Cable Act itself limits the permissible scope of state and local authority. As the Commission already recognized in the *Franchise Order*, Section 621(a)(1) of the Cable Act places meaningful limits on the actions of LFAs, and LFAs are not permitted to make demands **of** new video entrants that rise to the level of an unreasonable refusal to award a competitive franchise. The Commission recognized that "Section 621(a)(1) establishes **a** clear, federal-level limitation on the authority **of** LFAs in the franchising process in order to 'promote the

availability to the public of a diversity of views and information through cable television and other video distribution media,' and to 'rely on the marketplace, to the maximum extent feasible, to achieve that availability."' *Id.* ¶ 8. LFAs are not allowed to circumvent this significant statutory limitation on their discretion, and thus unreasonably burden competitive entry, by imposing supposed customer service rules that are so onerous that they would frustrate or otherwise unreasonably burden competitive entry should be preempted.

In addition, the reservation of authority expressed in Section 632(d)(2) is, on its face, a narrow provision that provides no authority to impose intrusive regulation on non-cable services. Section 632(d)(2) only speaks to customer service regulations that apply to a "cable operator," and by definition a given entity qualifies only to the extent that it is providing "cable service" over a "cable system." This provision does not authorize any regulations that reach beyond cable services, including regulation of broadband or telecommunications facilities or services. See 47 U.S.C. § 552(a) ("A franchising authority may establish and enforce. . . customer service requirements of the *cable operator."* (emphasis added)). Moreover, Section 632(d)(2) only addresses LFAs' authority to adopt regulations that may fairly be characterized as "customer service" rules, and not all manner of regulation. Therefore, Section 632 only authorizes a narrow type of regulation (*i.e.,* customer service regulation) in a particular context (*i.e.,* a cable operator while providing cable services). This provision cannot be read to establish sweeping regulatory control over video or broadband providers or their facilities or services.

In light of these Cable Act limitations, the Commission should reiterate the limited sway of local authority in the regulation of video providers and the Commission's authority to preempt local regulations that go too far. So, for example, an LFA should not be permitted to impose an

otherwise impermissible build-out requirement on a video provider, simply by characterizing that requirement as a "customer service" requirement.

In addition, any customer service requirements must be reasonable, and not rise to the level of an unreasonable refusal to award a competitive franchise. For example, in the context of a new entrant employing advanced technologies, it clearly would be unreasonable for an LFA to fail to take into account any unique attributes of the provider's technology. Thus, an LFA could not impose on a provider delivering video over fiber any supposed customer service requirements that are designed specifically for providers delivering service over a coaxial network. An example would be a requirement that performance testing be performed in a manner crafted to test particular limitations of coaxial networks that are not present in the case of fiber.

Rather than burdensome regulation, cable customer service rules must be limited to the general types of things recognized in Section 632 to be customer service requirements.[3] See 47 **U.S.C.** § 552(b) (requiring Commission to adopt certain default customer service standards). Any such requirements that unreasonably burden competitive entry would run afoul of the limitations imposed by Section 621(a)(1) and should not be viewed as the types of "customer service" rules for cable services that Section 632(d)(2) permits. The Commission should

[3] Under the doctrine of ***ejusdem generis***, the general authorization for "customer service" requirements must be read in light of the customer service requirements addressed in the statute. ***See, e.g., Circuit City Stores v. Adams,*** 532 **U.S.** 105, 114-15 (2001). Likewise, another basic canons of statutory construction recognizes that any general words in a statute – like "customer service requirements" – must be interpreted in a manner consistent with other associated specific words provided in the same provision. See, *e.g., Gutierrez v. Ada, 528* U.S. 250,255 (2000) ("Words. . . are known by their companions."); *Jarecki v. G.D. Searle & Co., 367* U.S. 303, 307 (1961) ("The maxim ***noscitur a sociis*** . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.").

reiterate its authority to consider – and if appropriate, preempt – local regulations that arc unreasonable and exceed the proper scope of local jurisdiction.

2. In addition to these particular limitations on LFAs' customer service authority imposed by Sections 621(a)(1) and 632(d)(2), LFAs also must exercise their customer service jurisdiction in a manner that is consistent with overriding federal communications policies, including in particular the policies aimed at encouraging broadband deployment and video competition. See Section 706 of the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56; *see also* 47 U.S.C. § 157(a) ("the policy of the United States to encourage the provision new technologies and services to the public"); *Franchise Order* ¶ 130 ("The national policy of promoting a competitive multichannel video marketplace has been repeatedly reemphasized by Congress, the Commission, and the courts."). In particular, the Commission should not permit supposed cable customer service requirements to impede or otherwise burden deployment of, and investment in, broadband networks and services.

Encouraging the deployment of broadband is a preeminent federal communications policy. The Commission has recognized that "Section 706 of the Telecommunications Act of 1996 directs the Commission to encourage broadband deployment by removing bamers to infrastructure investment, and the U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission may fashion its rules to fulfill the goals of Section 706." *Franchise Order* ¶ **4. As** the Commission noted in the *Franchise Order,* "broadband deployment and video entry are 'inextricably linked,"' and thus any "unreasonable barrier to entry for the provision of video services . . . . necessarily hampers deployment of broadband services." *Id.* ¶ 51; *see also id.* ("[A]lthough **LFAs** only oversee the provision of wireline-based video services, their regulatory actions can directly affect the provision of voice and data services, not just cable.").

Any such unreasonable barriers to broadband infrastructure investment posed by local regulation are "in direct contravention of the goals of Section 706, the President's competitive broadband objectives, and our established broadband goals." *Id.* ¶ 52. For that reason, the Commission has already recognized that "Section 706, in conjunction with Section 621(a)(1), requires [the Commission] to prevent LFAs from adversely affecting the deployment of broadband services through cable regulation." *Id.* ¶ 41.

In the *Franchise Order*, the Commission already took an important step towards preventing LFAs from interfering with the deployment of broadband by recognizing the limited reach of local regulation over non-cable services. In that order, the Commission concluded that it would be "unreasonable for an LFA to refuse to grant a cable franchise to an applicant for resisting an LFA's demands for regulatory control over non-cable services or facilities," and that "an LFA has no authority to insist on an entity obtaining a separate cable franchise in order to upgrade non-cable facilities." *Id.* ¶ 121. The Commission also reiterated the local authorities' lack of jurisdiction over non-cable facilities or services, stating:

> We further clarify that an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services. We agree with Verizon that the "entirety of a telecommunications/data network is not automatically converted to a 'cable system' once subscribers start receiving video programming." For instance, we find that the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator's entire network, or any services beyond cable services. *Local regulations that attempt to regulate any non-cable services offered by video providers are preempted because* such regulation is beyond the scope of local franchising authority and is inconsistent with the definition of "cable system" in Section 602(7)(C).

Id. ¶ 122. **The** Commission should re-affirm these conclusions.

In addition, the Commission should reiterate that other state or local regulations that undermine federal broadband policies similarly would be preempted. In order to avoid

preemption, state or local authority must be exercised in a reasonable manner that does not unduly burden broadband providers or undermine federal broadband and video goals. So, for example, regulations couched as "cable customer service" rules that, in reality, impose new regulatory burdens on broadband networks or services would be preempted (even if cable services are also delivered over the same network). Examples include rules dictating or otherwise regulating the location or timing of a provider's broadband service offerings or broadband network deployment or installation. Local rules purporting to regulate or otherwise impose requirements on broadband networks and services would create significant inefficiencies for the operators of regional or national broadband networks, given the possibility of multiple levels of overlapping, disparate, and potentially conflicting regulations that could result, and permitting such rules would significantly burden broadband deployment.

The Commission has ample authority to preempt state or local regulations that threaten federal broadband policies. Notwithstanding Section 632(d)(2), the Commission has authority to preempt any local regulations that stand as "an obstacle to the accomplishment and execution of the full objectives of Congress," including 621(a)(1)'s pro-competitive mandate or Section 706's pro-broadband policy. See *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986); *Hines v. Davidowitz*, 312 U.S. 52 (1941). Similarly, the Commission may preempt such state or local laws where, "(1) the matter to be regulated has both interstate and intrastate aspects . . . (2) FCC preemption is necessary to protect a valid federal regulatory objective . . . and **(3)** state regulation would 'negate[] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects." *PSC of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990)

(citations omitted)."[4] Preemption is proper on this basis whenever "separation [of interstate and intrastate aspects is] not practical." *PSC of Maryland,* 909 F.2d at 1516. The Commission has already determined that broadband Internet access services are inherently interstate services subject to regulation, if at all, at the federal level.' Likewise, video services – particularly when offered over a national broadband network that supplies multiple services, including services like high-speed Internet access and voice-over-IP, that the Commission already has ruled are inseparably interstate services – also are interstate services that cannot be parceled meaningfully between interstate and intrastate components.'

Leaving unfettered discretion to LFAs to impose all types of supposed local customer service rules – no matter how unreasonable or the impact on broadband deployment and video competition – on such interstate services could frustrate the overriding federal broadband and video policies. Section 632(d)(2) does not permit that result. The Commission should make clear that state and local regulations may not rise to the level of an unreasonable refusal to award a competitive franchise, exceed the proper scope of local jurisdiction, or threaten federal broadband or video policies.

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[4] ***See also Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,*** 19 FCC Rcd 22,404 ¶ 19 (2004).

[5] ***GTE Telephone Operating Cos. GTOC*** *Tariff No. 1, GTOC* ***Transmittal No. 1148,*** 13 FCC Rcd 22,466 ¶¶ 26-29 (1998) (concluding impractical to separate the interstate and intrastate aspects of DSL services).

[6] In Verizon's case, for example, the programming that Verizon delivers is transmitted via satellite by various national and international programmers, received by Verizon at one of its national super head-ends, and transmitted around the country over Verizon's long haul, fiber facilities to the areas where Verizon offers service.

II. Most of the Commission's Conclusions from the *Franchise Order* Should Apply To Existing Franchise Holder Upon Renewal.

Except to the extent that specific statutory provisions separately address particular issues related to franchise renewals – such as the four-month time limit on the renewal process set out in Section 626 – the Commission's rules and interpretations adopted in the *Franchise Order* generally apply to all cable operators seeking renewal of a franchise in any jurisdiction with two or more franchise holders? In such locations with wireline video competition, all subsequently issued franchises should be considered "competitive franchises."

Applying the Commission's *Franchise Order* rules and findings to the renewal context also makes sense given that many of those findings and rules were based in large part on provisions of the Cable Act that, on their face, apply equally to all providers. While the Commission's ovemding consideration in the *Franchise Order* was removing unreasonable and unlawful barriers to ***competitive*** entry – and thus the pro-competitive mandate of Section 621(a)(1) bolstered all of the Commission's conclusions – many of its specific findings were independently required or supported by other provisions of the Cable Act. For example, in addressing the limitations placed by the Section 622 franchise fee provision on LFA demands, the Commission recognized that some of its conclusions were "a matter of statutory

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[7] **Of** course, certain, other cable rules also distinguish between incumbents and new entrants for some purposes. For example, rate regulation may continue to apply to incumbents until such time as they demonstrate to the Commission the presence of effective competition within a franchise area, but the competitive provider who may trigger such a finding is never subject to rate regulation itself. Section 623 and the Commission's regulations provide that new entrants are not subject to rate regulation, nor are they required to file a petition for a determination of effective competition in order to avoid such regulation. The Cable Act states that an LFA may not regulate the rates charged by a cable operator unless it first obtains permission from the Commission to do so. 47 U.S.C. § 543(a)(3) & (4). In the case of new entrant entering the market to compete against an incumbent provider, an LFA cannot obtain such permission because it necessarily has "actual knowledge" that the provider will be subject to effective

construction." *Id.* ¶ 105 n. 351; ***see also id.*** ¶¶ 94-109. Likewise, the Commission's conclusions with respect to issues such as limitations on build-out requirements, ***see id.*** ¶¶ ***83-86,*** PEG and I-Net requirements, ***id.*** ¶¶ 112-20, and local regulation of mixed-use broadband networks and broadband services, ***see id.*** ¶¶ 121-23, all recognized the limitations imposed on LFAs by provisions **of** the Cable Act other than Section 621(a)(1). The Commission's definitive constructions of the limitations imposed by these statutory provisions should apply to all providers as they negotiate new franchises or renew existing ones.

Of course, to the extent cable operators agreed to more than the Cable Act requires in their existing franchises, they are bound by the terms of those agreements until those franchises expire unless they are able to satisfy the standards for modification of an existing franchise set out in Section 625 of the Cable Act.[8] But they are obviously free to negotiate different terms consistent with the Act when their franchises come **up** for renewal.

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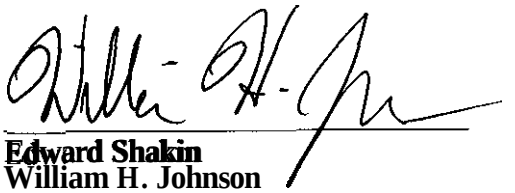
competition. ***See*** 47 C.F.R. § 76.910(b)(4). Therefore, new entrants are exempt from rate regulation.

[8] 47 U.S.C. § 545 (allowing modifications, among other circumstances, when compliance with franchise requirements is "commercially impracticable").

Respectfully submitted,



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